No. 87-107

In The Supreme Court of the United States

October Term, 1987

Brenda Patterson,
Petitioner,

v.

McLean Credit Union,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the Respondent. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

As employers, the Council's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), as well as the Civil Rights Act of 1866 (Section 1981). As such, they have a direct interest in one of the issues presented for the Court's consideration: that is, whether in proving a case of intentional discrimination in the denial of a promotion, a plaintiff must demonstrate that she was better qualified than the individual(s) selected.[1]

Because of its interest in the issues related to the standard of proof in employment discrimination cases, the Council has filed briefs amicus curiae in this Court in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438

[1] The Court also granted certiorari on the question of whether racial harassment is actionable under Section 1981. This brief is limited to the issue of promotion discrimination.

U.S. 567 (1978); and *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

The Petitioner, Brenda Patterson, is a former employee of the Respondent, McLean Credit Union. Ms. Patterson, a black female, worked for the credit union as a teller and file coordinator from May 1972 until July 1982 when she was laid off. In 1984, she initiated this action under 42 U.S.C. § 1981 alleging that she had been a victim of race discrimination by the employer. In particular, she alleges that she was subjected to racially-motivated harassment and that she was denied a promotion because of her race.[2]

The Petitioner's allegation of promotion discrimination challenges the employer's decision in 1982 to give the job title "Account Intermediate" to Susan Williamson, a white employee. Williamson had previously held the job title of "Account Junior." Petitioner alleges that this was a promotion, and that Williamson was less qualified than Petitioner for the job. At trial, the employer argued that this transaction was simply a change in Williamson's job title with no change in her responsibilities, functions or supervision. The employer presented evidence to show that Williamson was more qualified than Petitioner to do each job function required for the accounting position and that Williamson's annual performance evaluations had exceeded the Petitioner's.

[2] The district court granted a directed verdict on the claim of racial harassment.

The claim of promotion discrimination was submitted to the jury, which returned a verdict for the employer. On appeal, the Petitioner challenged the district court's instruction to the jury because it indicated that for Petitioner to prevail, she had to show that she was more qualified than Williamson. The Court of Appeals ruled that:

> once an employer has advanced superior qualification as a legitimate nondiscriminatory reason for favoring another employee over the claimant, the burden of persuasion is upon the claimant to satisfy the trier of fact that the employer's proffered reason is pretextual, that race discrimination is the real reason.
>
> That was the situation here, and the district court therefore properly instructed the jury that the burden was upon the claimant to prove her superior qualifications by way of proving race discrimination as the effective cause of the denial to her of "promotion." . . . This simply reflects the principle established in Title VII cases that an employer may, without illegally discriminating choose among equally qualified employees notwithstanding some may be members of a protected minority.

Patterson v. McLean Credit Union, 805 F.2d 1143, 1147 (citations omitted). The Court of Appeals thus concluded that the trial court's instructions were proper.

SUMMARY OF ARGUMENT

The Petitioner takes issue with the trial court's instructions to the jury on the grounds, *inter alia*, that they were framed so as to require her to prove not merely that she was *as well* qualified for promotion as the person selected, but that she was in fact *better* qualified. A mere showing that the Petitioner's qualifications were equal to those of the individual promoted, however, would not warrant a conclusion that the employer had based its decision on discrimination, rather than on its assessment of the individuals' relative qualifications.

It is well settled that the plaintiff in an individual promotion discrimination case bears the ultimate burden of proving intentional discrimination. The law set forth by this Court further provides that an employer has discretion in choosing among equally qualified candidates. Therefore, in a case alleging promotion discrimination, where the employer has responded to the plaintiff's evidence by showing that it promoted an individual it judged to be better qualified, the plaintiff cannot prevail simply by presenting evidence to show that she may have been as qualified as the person who received the promotion. Rather, unless it appears at the conclusion of all the evidence that the plaintiff was so clearly better suited for the position than the person selected that the employer, in the exercise of its discretion to judge their respective qualifications, could not reasonably have concluded otherwise, the plaintiff has failed to meet her burden of proving that the employer's explanation for its decision was pretextual.

ARGUMENT

WHEN THE EMPLOYER IN A PROMOTION DISCRIMINATION CASE HAS PRESENTED EVIDENCE THAT IT JUDGED THE PERSON PROMOTED TO BE BETTER QUALIFIED THAN THE PLAINTIFF, THE PLAINTIFF'S BURDEN OF PROVING INTENTIONAL DISCRIMINATION CANNOT BE SATISFIED SIMPLY BY A SHOWING THAT HER QUALIFICATIONS MAY HAVE BEEN EQUAL TO THOSE OF THE PERSON PROMOTED.

A. This Court Has Recognized That An Employer Has The Discretion To Choose Among Equally Qualified Candidates.

This Court has been very clear in ruling that an employer has the right to use its discretion in choosing among equally qualified candidates, provided that the choice is not based on illegal criteria. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Equally well established by this Court is the principle that the burden of proving intentional discrimination rests upon the plaintiff. *Burdine*, 450 U.S. at 254.[5] To the extent that the

[5] The burden of proof issue before the Court in this case, as viewed by the Amicus, primarily concerns the ultimate burden imposed on a plaintiff in a case alleging intentional discrimination. In past decisions, this Court has been careful to distinguish between that burden of proof on the ultimate question and the rules governing "the basic allocation of burdens and order of presentation of proof" in discrimination cases. *Burdine*, 450 U.S. at 252. As the Court observed in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), this latter set of legal rules notwithstanding, courts should not "treat discrimination differently from other ultimate questions of fact." 460 U.S. at 716. In discrimination cases brought under either Title VII or Section 1981, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff

arguments made by Petitioner in this case seek to shift that burden or to restrict an employer's legitimate discretion in selecting individuals for promotion, the Court should reject those arguments as being impractical and unsupported by the law.

This case involves an individual claim alleging discrimination in the denial of a promotion. In response to the evidence presented by the plaintiff, the employer offered evidence to show that it judged the person who received the promotion to be better qualified than the plaintiff. Under the standard for presentation of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the next step was for the plaintiff to offer any evidence she had to demonstrate that the legitimate nondiscriminatory reason articulated by the employer was merely a pretext for intentional discrimination. This evidence could take the form of a showing by the plaintiff that she was in fact, *more* qualified than Williamson, the person selected for the promotion. A mere showing that her qualifications were *equal* to Williamson's, however, would not suffice to meet her ultimate burden. Rather, only if the jury were convinced that the Petitioner was clearly better qualified than the person who was promoted would it have been warranted in concluding that the employer's explanation must not have been sincere.

In *Johnson v. Transportation Agency*, 107 S.Ct. 1442, 1457 n.17 (1987), this Court observed that differences in qualifications between individual candidates for promotion are sometimes minimal and may

remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

depend on subjective determinations as to which candidate is "best qualified."* Where a single opportunity for promotion is involved, logic does not suggest, and the law does not require, that an inference of discrimination be drawn from a mere showing that the plaintiff's qualifications were arguably comparable to those of the person promoted. Rather, to support a finding that the employer's proffered ex-

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* To permit the plaintiff to prevail simply on the basis of a showing that she is as qualified as the person selected for the promotion would be essentially the same flawed reasoning which this Court corrected in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). As the Court there stated:

> The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U.S. at 804. The Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would in effect, conclude that it has discriminated.
>
> The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex, and national origin. . . . Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U.S.C. § 2000e-2(j). *See Steelworkers v. Weber*, 443 U.S. 193, 205-206 (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.*, at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978).

450 U.S. at 258-59.

planation for its decision was pretextual, the evidence must compel the conclusion that the employer, in the exercise of its discretionary authority to evaluate the credentials of candidates, could not reasonably have concluded that the person selected was in fact better suited for the position than the plaintiff. In the ordinary case, this will require a showing that the plaintiff's qualifications are clearly superior to those of the person chosen.

Petitioner's arguments stress that there may be situations in which a plaintiff is unable to prove that she is more qualified than the person who was promoted, but nonetheless may be able to produce evidence of an overt policy of discrimination. As an example, Petitioner cites the airline policy at issue in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which specifically differentiated between airline captains on the basis of their age. There is no disagreement with the proposition that an overt policy of disparate treatment can constitute direct evidence of illegal discrimination. But the Petitioner's arguments in this regard miss a critical point. That is, in most cases involving allegations of discrimination in promotion there is no direct evidence of an overt discriminatory intent, but there is an assessment of the relative qualifications of the person who was promoted and a person who was not.

Indeed, the *McDonnell Douglas* formula is useful precisely because so often there is no direct evidence of discriminatory intent.* In explaining how that formula works, this Court has observed that one of

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* *See Aikens*, 460 U.S. at 716.

the most frequent reasons for legitimately rejecting a person for a job is a relative lack of qualifications.[6]

This point must not be overlooked in ruling on the issue before the Court in this case. The essence of the *McDonnell Douglas* approach is that an inference of intentional discrimination may be warranted where the most common legitimate reason why an individual may be denied a particular position are lacking.

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

To be sure, an individual plaintiff is not limited to following the *McDonnell Douglas* formula, and that formula was never intended to be "rigid, mechanized, or ritualistic."[7] But an individual who tries to prove intentional discrimination without addressing the most common legitimate reasons for nonselection (that is, the issues of whether there was a vacancy and whether the person chosen had superior qualifications) has taken on a very difficult burden. In such a situation, the plaintiff's effort is not pushed along by the strong force of the logic which drives the *McDonnell Douglas* formula.

In the instant case, the focus is not on the evidence needed to demonstrate a prima facie case (although much of Petitioner's argument is framed in those terms). Rather, the key issue here is what must be shown by a plaintiff after the employer has produced evidence that it judged the qualifications of the person selected to be superior to the plaintiff's. The Court has observed that at this stage, the presumption created by the *McDonnell Douglas* formula "drops from the case"[8] and "the factual inquiry proceeds to a new level of specificity."[9]

In their arguments to this Court, however, Petitioner and the Department of Justice find fault with

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[6] In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court recognized that a relative lack of qualifications is one of the two most common legitimate reasons for refusing one candidate and selecting another:

> The *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

431 U.S. at 358 n.44. See also, *Burdine*, 450 U.S. at 254.

[7] *Furnco*, 438 U.S. at 577.

[8] *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *Burdine*, 450 U.S. at 255 n.10.

[9] *Burdine*, 450 U.S. at 255; *Aikens*, 460 U.S. at 715.

a jury instruction which addresses the factual inquiry on this "new level of specificity," rather than the general theories available to prove a prima facie case. They seem to suggest that the court's instructions to the jury were improper because they were related to the specific factual dispute raised by the evidence in the case. They argue that a proper instruction would have advised the jury of all the various alternate theories of discrimination, without regard to the available evidence. The flaw in Petitioner's approach is not unlike the flaw pointed out by this Court in *Aikens*. In that case, the parties and the Court of Appeals continued to focus on the issue of whether the plaintiff had proven a prima facie case even after the case had been fully tried on the merits. As this Court observed;

> by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.

460 U.S. at 714. Similarly, the approach urged here by the Petitioner tends to evade rather than confront the ultimate question of intentional discrimination—i.e. the very question which the jury had to decide.

The evidence previously introduced by the plaintiff and by the defendant remains in the case, to be considered by the trier of fact on the ultimate issue of whether the plaintiff was a victim of intentional discrimination. Thus, while a plaintiff may have a variety of options for presenting evidence of a prima facie case, a plaintiff cannot ignore the issue of relative qualification once it has been raised in a promotion discrimination case. The ultimate burden of convincing a trier of fact that the employer intentionally discriminated is on the plaintiff [10] and a trier of fact is entitled to find against a plaintiff who fails to overcome the employer's evidence that it selected an individual it judged to be better qualified than the plaintiff.

The arguments made by the Petitioner and the Department of Justice in this case focus on the unusual rather than the typical issues raised in a claim of promotion discrimination. Any guidance provided by the Court here with respect to claims of promotion discrimination should recognize that most claims of promotion discrimination hinge on an assessment of relative qualifications. The Petitioner's focus on direct evidence must not serve to confuse the already established principle that a plaintiff whose evidence shows only that she is as qualified as the person who was promoted has not proven the existence of intentional discrimination. Moreover, even if the plaintiff offers evidence that the employer may have misjudged the relative qualifications of the individuals, that evidence alone does not create liability under Title VII or Section 1981.[11]

In examining the Petitioner's discussion about how to assess relative qualifications, it should be noted

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[10] *Burdine*, 450 U.S. at 254. For an indication of the type of evidence which could support a finding of discrimination in a case which has been fully tried, see the Court's discussion in *Aikens*, 460 U.S. at 715 n.2.

[11] *Burdine*, 450 U.S. at 259. This same rationale applies in the context of claims alleging age discrimination in a reduction-in-force. In such cases, courts have recognized that a plaintiff who shows simply that he was a competent employee and that he was laid off when a younger employee was retained has not demonstrated discrimination. *See, e.g., LaGrant v. Gulf+Western Mfg. Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984) (plaintiff's subjective determination that he was

that Petitioner relies heavily upon the decision in *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810 (8th Cir. 1983), to demonstrate that rulings by other courts are in conflict with the decision in this case by the Fourth Circuit. Petitioner's reading of *Hawkins*, however, goes beyond the facts of that case. In fact, a careful reading of that decision reveals that the court's conclusion that discrimination occurred was supported by a finding that plaintiff was *better* qualified than the person who got the job *and* a finding that the person who got the job did not possess the educational qualifications that the employer professed to require. Indeed, it appears the jury instructions challenged by Petitioner here would have permitted a finding of discrimination in the *Hawkins* case.[10]

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better qualified than the worker who was retained was not enough to make a case of discrimination), and *Saindi v. Reynolds Chemical*, 656 F.2d 1116, 1118 (6th Cir. 1980) (a plaintiff's showing that he was replaced by an equally qualified employee of a younger age is insufficient to support an inference of discrimination).

[10] The job at issue in *Hawkins* was that of material control analyst, a position created during a reorganization. This new position involved the very same duties of "inventory planning, allocation and short-term forecasting" which plaintiff had been performing prior to the reorganization. The employer argued that it had chosen a person with superior qualifications. The court found, however, that the plaintiff had worked for the employer for seven years satisfactorily performing the same duties that were included in the new position, while the person chosen instead of the plaintiff had a total of only five and one-half years experience doing such work for other companies. 697 F.2d at 814. The court's analysis of the evidence indicates that the record supported a finding that plaintiff Hawkins was better qualified than the person who was selected. The court further found that the person who got the job did not in fact possess the type of college degree which the employer allegedly required.

B. The Court Should Reject Petitioner's Attempt to Characterize this Claim of Individual Disparate Treatment as a Pattern and Practice Case.

A central theme in the arguments made by Petitioner in this Court is that evidence of an overt policy of discrimination or evidence of a pattern or practice of discrimination shifts the burden of proof to the employer. The Petitioner purports to find support for this theory in this Court's references in *Burdine*, *Aikens* and *Thurston* to footnote 44 in the *Teamsters* decision.[11]

Footnote 44 does not support Petitioner's argument. Rather, it specifically states that an employer's isolated decision to reject a minority applicant does not show that the rejection was racially based. It then goes on to explain the functioning of the *McDonnell Douglas* test as it is explained above. That is, that a relative lack of qualifications is one of the two most common legitimate reasons for rejecting an applicant, and that by eliminating the most common reasons for rejection, a plaintiff may create an inference of discrimination. Contrary to the Petitioner's assertion, the footnote does not discuss the suggestion that a plaintiff may shift the burden of proof to the employer by offering direct evidence of an overt policy of discrimination.

In addition, Petitioner's arguments overstate the usefulness of a "pattern" of discrimination in proving an instance of individual disparate treatment. In *McDonnell Douglas*, this Court noted the possibility that the racial composition of an employer's work force may be reflective of exclusionary practices, but added:

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[11] The text of *Teamsters* footnote 44 is set forth in footnote 6 of this brief, at page 10, *supra*.

> We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individual hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

411 U.S. at 805 n.19.

In a case involving an individual allegation of promotion discrimination, where the employer has introduced evidence of superior qualifications, the plaintiff's effort to prove pretext cannot succeed if it is not responsive to the issue of relative qualifications.

CONCLUSION

The Court of Appeals for the Fourth Circuit correctly ruled that in a case involving an allegation of promotion discrimination, where the employer has produced evidence that it relied upon the superior qualifications of the person it selected over the plaintiff, the plaintiff cannot prevail simply by relying on evidence which arguably shows that she may be as qualified as the person who received the promotion. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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January 15, 1988

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